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# Israel's Absentee Property Law: When is Democratic Failure Necessary?

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Claremont McKenna College

Israel's Absentee Property Law:  
When is democratic failure *necessary*?

Submitted to  
Professor George Thomas  
and  
Professor Gary Gilbert

by  
Bria Smith

for  
Senior Thesis  
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## **Abstract**

This paper defends Israel's expropriation of property under the Absentee Property Law within the state's pre-1967 borders on constitutional grounds, but holds that the Law's increased use in the region of East Jerusalem is invalid under Israel's constitutional scheme. This distinction turns upon the state's application of the Law for necessary purposes. I hold that Israel's justification for breaching human rights explicitly protected must be based on the state's need to preserve its foundational ideology and national purpose in times of extra-normal circumstances. Israel may act undemocratically only to the extent imperative to preserve the Jewish nation and the existence of the Jewish state for generations to come.

## **Acknowledgements**

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## Table of Contents

Introduction .....	6
The Origins of the Absentee Property Law and its Application to East Jerusalem.....	15
Israeli Constitutionalism: A Time-Stamped Defense of Human Dignity and Civil Liberties? ....	25
Interpreting the Validity of Laws Clause Broadly .....	35
Differentiating Cases: The Absentee Property Law’s Initial Application vs. Its Use in East Jerusalem .....	45
Concluding Remarks .....	60
Works Cited .....	63

## Introduction

On July 24, 2003, the State of Israel issued a certificate of expropriation for 0.84 acres of land in Abu Dis, East Jerusalem on which a hotel stood. This property had been held by the Ayad family for over three and a half decades, but suddenly, the state told the family members that this property no longer belonged to them and that the family had lost all ownership rights. The Israeli government simply asserted one day that the property instead belonged to the state, despite the fact that no member of the Ayad family had performed any action that could be deemed questionable or dangerous by the Israeli government. Additionally, most of the land was neither necessary for military purposes nor public needs (HCJ 2038/09, para. 6).<sup>1</sup>

In a similar case, Daoud Hattab Hussein and Alian Issa Azat purchased property in Beit Safafa, East Jerusalem under market conditions in the early 1990s. Hussein and Azat were residents of Beit Safafa, and following an Israeli law that requires the registry of all property transactions in the Israeli Land Registry after its purchase, Hussein and Azat attempted to catalogue their new property with the government so that they could obtain necessary permits. The state declined their registry request, however, and in 1996, informed Hussein and Azat that their purchase did not have any legal standing. The Israeli government held that the rights to this property belonged to the state, regardless of their purchase and despite the fact that Hussein and Azat had done nothing to elicit an expropriatory response. The state again did not express any need for this land on the grounds of public needs or military purposes (HCJ 5931/06, para. 3). So what happened in these two cases? How could Israel suddenly expropriate property from

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<sup>1</sup> Due to the proximity of this property to the security fence between East Jerusalem and the West Bank, part of this property was demolished with the consent of the parties by virtue of the Emergency Land Requisition Law 5710-1949. In 2013, part of the land was also expropriated for security purposes by virtue of the Acquisition for Public Purposes Ordinance. However, the remainder of this property was taken by the state for other purposes, due to its classification as absentee property-- the issue which we will explore in this paper.

permanent residents for no apparent reason? How could the State of Israel act so undemocratically?

Since the authorization of its Declaration on May 14, 1948, Israel has identified itself as both a Jewish and democratic state. Its Declaration, known as the *Proclamation of the State of Israel*, highlights the values the state aims to uphold:

The State of Israel will be open to the immigration of Jews from all countries of the dispersion; will promote the development of the country for the benefit of all its inhabitants; will be based on the precepts of liberty, justice and peace taught by the Hebrew Prophets; will uphold the full social and political equality of all citizens, without distinction of race, creed or sex; will guarantee full freedom of conscience, worship, education and culture; will safeguard the sanctity and inviolability of the shrines and Holy Places of all religions; and will declare itself to the principles of the Charter of the United Nations. (*Proclamation of the State of Israel*)

With the exception of the first proposed value--which speaks to Israel's Jewish identity-- Israel clearly declares itself to be a liberal democracy. It commits to uphold individual rights to conscience, worship, education, and culture as well as maintain the equal treatment of its citizens and "promote the development of the country for the benefit of all its inhabitants" (*Proclamation of the State of Israel*). Although the members of the Ayad family and Hussein and Azat were all permanent residents of Israel and not citizens, the question of whether Israel still has to respect the property rights of non-citizens was resolved at the constitutional level in 1992. That year, Israel reinforced its democratic identity with the establishment of Basic Law: Human Dignity and Liberty (1992) and Basic Law: Freedom of Occupation (1992), which the courts have found to have superior standing to ordinary legislation. Through the ratification of these two Basic Laws, Israel declared its commitment to human rights and to the respect of human dignity on the constitutional level, one aspect of which, according to explicit language in Basic Law: Human Dignity and Liberty, protects property rights for all persons.



The State of Israel must therefore respect individual property rights because they are explicitly defined as part of a person's human dignity under the two Basic Laws considered vital to the delineation of the state's democratic identity. Under the laws, one holds express rights to property simply as an attribute of one's intrinsic worth as a person against which the state cannot infringe. However, in the two cases above, the State of Israel clearly undermined its own permanent residents' property rights, creating tension with Israel's democratic identity and the Basic Laws that uphold these democratic values. Israel's explicit violation of its permanent residents' property rights displayed disregard for these individuals' dignity as people whom the state ought to protect, therefore drawing the state's democratic identity into question. At the very least, the state's expropriatory actions in these cases exist in direct conflict with the values articulated by the state's democratic identity.

However, before examining the narrow issue of Israel's protection of Arab property rights, we must first understand the purpose and ideology behind Israel's Jewish identity. According to Chaim Gans,

[t]here are three defining tenets that constitute the common denominator for all the versions of Zionism [the philosophical and political national movement recognized as providing the ideological foundation for the State of Israel]. The first is that the Jews, apart from sharing a religion, also form an ethno-cultural nation. The second is the ethno-cultural principle. According to it, members of groups sharing a common history and culture have fundamental, morally significant interests in adhering to their culture and in sustaining it primarily by means of the right to national self-determination. The third tenet of Zionism is that Jews should realize their right to ethno-national self-determination in Zion, namely in the historical homeland from which the Jewish people have been cut off since antiquity. (Gans 473)

In strains of political Zionism, this self-determination argument was conflated with an argument against anti-semitism. The result of this movement was a push for an independent Jewish political state, given the understanding that sovereignty was the only solution to growing sentiments of anti-semitism across Europe.

In 1882, Yehuda Leib Pinsker published his work “Auto-emancipation: An Appeal to His People by a Russian Jew” in which he expressed, “[t]he essence of the [Jewish] problem... lies in the fact that, in the midst of the nations among whom the Jews reside, they form a distinctive element which cannot be assimilated, which cannot be readily digested by any nation” (Pinsker 182). This assertion was then taken up by Theodore Herzl a little over a decade later, who argued that Jews would not be able to truly assimilate into any country without a Jewish majority. Perhaps foreseeing worsening anti-semitic relations between Jews and gentiles that ultimately resulted in the Holocaust, Herzl held that the only solution to anti-semitism was sovereignty based upon the Jewish people’s “rightful national requirements” (Herzl 220). Zionism’s foundational thinkers argued that Jews, exhibiting one nationalist people, had a right to statehood and that the unsolvable nature of the “Jewish question”--the question of what to do with a population of Jews who do not conform with the rest of society--necessitated the establishment of a Jewish state. For political Zionists, anti-semitism would always exist unless the Jewish nation was given a political state of its own.

Despite current ideological differences between various Israeli political parties regarding the fundamental nature of Israel’s Jewish identity, the most paramount of these sentiments are articulated in the state’s Proclamation, which fortifies the state’s central foundational tenets. Regarding its language about Israel’s Jewish identity, the Proclamation greatly reflects the central pillars of Zionism underscored above. The document highlights that Israel will be open to all members of the Jewish nation, a claim that was secured into Israel’s legal system by the Law of Return (ratified in 1950, later amended in 1970), so as to affirm that *all* Jews make up the Jewish nation and that Jews constitute a people. The Proclamation further regards the rights of the Jewish nation’s sovereignty as both “self-evident” due to the “right of the Jewish people to be a nation, like all other nations, in its own state” and necessary due to the fact that “[t]he Nazi Holocaust,

which engulfed millions of Jews in Europe, proved anew the urgency of the reestablishment of the Jewish State” (*Proclamation of the State of Israel*). Thus, from its founding, Israel has recognized itself as a state with a unique set of principles and values. As delineated in its Proclamation, the state’s primary foundational purpose is to ensure the self-determination and propagation of the Jewish nation, ethnicity, and religion for generations to come and to protect its Jewish citizens from the perpetuation of anti-semitism. Although Israel defines itself as both a Jewish and a democratic state, in order to protect Israel's very survival, the state must primarily safeguard its Jewish identity against the possible destruction of the Jewish nation. It must be a Jewish state first in order to uphold the state’s aspirations and functions.

While there are many instances in which the fundamental values of Judaism and Israel’s identity as a Jewish state coincide with those of liberal democracy, such as, as former Justice Aharon Barak writes, maintaining the “values of love of humanity, sanctity of life, social justice, doing what is good and just, protecting human dignity, the rule of the law-maker, and other such eternal values,” the state’s arduous history and the Middle East’s continued political pressures cause these two values to diverge in some of the most notable circumstances (Barak, “A Constitutional Revolution” 84). This paper will explore the issue of property rights in cases akin to the Ayad family’s case and Hussein and Azat’s case and maintain that these occasions reflect instances in which Israel’s Jewish and democratic values do not overlap. In these cases, I will argue that Israel should uphold its democratic promises to protect the dignity of all residents whenever possible and to the fullest possible extent. However, I will also recognize that the state may need to compromise its own democratic principles in instances necessary for the very existence and perpetuation of the Jewish state, but only to the extent required to uphold the state’s fundamental purposes.

The state's justification for its expropriative actions in the Ayad family and Hussein and Azat cases involves a complicated law termed the Absentee Property Law, which was originally passed by the Knesset in 1950 following the War of Independence. The Absentee Property Law states that any property that falls under the definition of 'absentee property' belongs to the state and can be used for the state's development. During the war, this property was confiscated by what became the Israeli state due to the fact that this property was enemy property and its owners fought against the very existence of Israel and its values. During the war, it was immediately essential for Zionist leadership to expropriate this property in order to prevent its potential use to harm Israeli forces, and thus, these expropriations were imperative to imminent wartime need. Yet this property was also not returned to its original Arab owners at the conclusion of the war, and expropriations of formerly Palestinian property under the Absentee Property Law were greatly responsible for providing Israel with a significant amount of its land prior to the 1967 war. Here, Israel had to maintain this land in order to protect the establishment of the Jewish state as well as respond to the imminent needs of Jewish immigrants who flooded the state in the first three years of Israel's sovereignty. Therefore, while the Law and its effects exist in direct tension with Israel's democracy, this paper will hold that these actions were often justified as necessary for Israel's very existence, survival, and ability to live up to its promises as a Jewish state in extremely pressing circumstances. These justifications for the state's expropriatory actions under the Law were thus legitimized by Israel's immediate need to preserve the Jewish nation and the existence of the Jewish state for future generations.

However, this Law's application to the region of East Jerusalem, where the Ayad family and Hussein and Azat's property is located, tells a different story. When Israel won the Six-Day War in 1967, it extended its legal and authoritative control to the entire region of East Jerusalem, thus applying the Absentee Property Law to the region. The state found that the Ayad family's

property and the property purchased by Hussein and Azat fit the definition of absentee property as defined by the Law and a few subsidiary laws clarifying its application to East Jerusalem. The state therefore held that it has owned rights to these properties since 1967, regardless of whether the Ayad family or Hussein and Azat knew of this ownership. Israel also argued that it has had the right to take this absentee property at any time since 1967. Those living on absentee property since 1967 have been doing so unlawfully, according to the state, and should consider themselves “unjustly enriched” (HCJ 2038/09, para. 36). The Ayad family, Hussein, and Azat’s cases are not obscure, isolated instances. Rather, they represent a larger group of Arab residents who have lost their property in East Jerusalem to the State of Israel via the Absentee Property Law. This paper will challenge Israel’s use of the Absentee Property Law in East Jerusalem and assert that while the Law may have been justified as necessary to maintain Israel’s Jewish identity within Israel’s boundaries prior to 1967, the present enforcement of this Law in East Jerusalem is not imperative to Israel’s foundational purposes and should therefore be halted.

I will argue that while the Absentee Property Law’s initial ratification in 1950 was justified on account of the fledgling state’s imminent need during the War of Independence and afterwards due to the massive immigration of the Great Aliyah, this reasoning does not apply to the state’s utilization of the Law in East Jerusalem. Israel must recognize the democratic failure that results when the state makes use of the Absentee Property Law to expropriate land held by permanent residents of East Jerusalem and therefore scrutinize its application such that it only applies the Law when it is essential for the perpetuation of the state’s identity. I will assert that the Law holds an important place in the establishment and continuation of Israel’s Jewish identity within its pre-1967 borders and must therefore remain constitutionally valid based upon arguments for necessity. Nevertheless, Israel should not act on the application of the Law in East Jerusalem because the state’s expropriatory actions in the region are not essential for the

immediate maintenance and preservation of Israel's identity as a Jewish state. In this paper, I will therefore hold that the legitimization of undemocratic actions based on necessity requires both external factors posing extreme tension with Israel's ability to represent and protect the perpetuation of the Jewish nation as well as immediate need under extranormal circumstances.

I begin this paper with a historical account of the Absentee Property Law's origins, its application to East Jerusalem, and an exploration of the Law's complicated fit within the current scheme of Israeli constitutionalism. Since the ratification of Basic Law: Human Dignity and Liberty in 1992, Israeli constitutional law has specifically underscored Israel's recognition of property rights as a necessary component of human dignity. It therefore first appears as though any state actions under the Absentee Property Law should be deemed invalid due to their violation of the basic rights protected under the Basic Law. However, as we will see, this matter is more complicated than it first appears. This same Basic Law that offers to constitutionally defend human dignity against encroachment by the government also protects laws enacted before 1992 from judicial scrutiny for the purpose of assuring Israel's foundational identity. Since the Absentee Property Law was enacted in 1950, we will examine how a specific clause in the Basic Law, termed the Validity of Laws clause, allows the Absentee Property Law to exist in conflict with the state's democratic principle of human dignity protection. However, we will also examine how this clause provides unnecessary protections of old laws. The basic statebuilding principles of these old laws that the Validity of Laws clause purports to secure are already guarded by the Basic Law's protection of Israel's paramount identity as a Jewish state.

I will therefore argue that Israeli courts should interpret the Validity of Laws clause broadly in order to maintain integrity within the Israeli legal system. Whenever possible, Israel should act within the principles set forth by the Basic Laws, securing human dignity and protecting human rights. However, I will also assert that interpreting these Basic Laws to ensure

robust democratic principles need not and cannot be allowed to swallow the state's foundational purposes and intentions. In instances in which a purely democratic solution would require Israel to endanger its Jewish identity, Israel might be forced to short its provision of democratic rights for immediate needs in order to protect its fundamental purpose as a state. These are precisely the protections set out within principles of the Basic Law.

This paper therefore seeks to spotlight Israel's conflation of its two identities as both a Jewish and democratic state in the context of the Absentee Property Law. In doing so, I will argue that while this Law does not fit with Israel's democratic identity and in practice largely calls its democratic nature into question, the initial enactment of this Law was required for the establishment of the State of Israel. Further, its enactment was especially important due to the mass immigration of Jews to the land in the first three years of the state's sovereignty, during which the state doubled its size. Israel's use of the Absentee Property Law within its pre-1967 territory is therefore justified on account of the fact that its immediate effects protected the preservation and continuation of Israel's identity as a Jewish nation during both the War of Independence and Israel's primary statebuilding years. But regarding the application of the Absentee Property Law to East Jerusalem following the Six-Day War, I will argue that these actions reflect an inexcusable use of state power. While Israel necessarily made use of the Absentee Property Law in 1950 and had to champion its Jewish identity over its democratic one to make feasible the survival of a Jewish sovereign nation-state as well as provide protection against anti-semitism, these circumstances did not exist in 1967. Israel therefore has no right to apply the Absentee Property Law to East Jerusalem because its application in this region further undermines Israel's democratic principles for purposes not imperative to the perpetuation of Israel's identity as a Jewish state.

## **The Origins of the Absentee Property Law and its Application to East Jerusalem**

Until 1948, Palestine/ Eretz Yisrael was a unified territorial unit. However, from the early 1900s, two national movements, the Jewish Zionist movement and the Arab Palestinian one, gained momentum, each desiring sovereignty over the same land. On April 2, 1947, the United Kingdom suggested that the United Nations General Assembly handle the question of what was to be done with Palestine. The resolution that the General Assembly finally adopted, known as the United Nations Partition Plan for Palestine, ordered the termination of the British Mandate and recommended the creation of independent Arab and Jewish states as well as a Special International Regime for the city of Jerusalem. Jerusalem was therefore to remain a separate body under international supervision-- a distinct entity belonging to neither Israel nor the Arab state.<sup>2</sup> While Jews greatly considered the UN resolution as “a sign that a global system of justice existed,” Arabs perceived this same action as a “flagrant wrong” that established a Jewish state on territory that ought to belong to them in its entirety (Shapira 156). Most Arab leaders within Palestine as well as from the neighboring countries rejected the plan and indicated their unwillingness to accept any sort of division of Palestine or the creation of a Jewish state (Shapira 156).

On November 30, 1947, the day after the adoption of the UN resolution, civil war broke out within Palestine/ Eretz Yisrael. Isolated community settlements on both sides came under siege and many upper and middle class Arabs hurried to depart for neighboring Arab states or else move to the hilly, Arab-populated regions, leaving much of their property vacant or in the hands of those who did not hold a direct claim of ownership (Shapira 157). The civil war soon became

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<sup>2</sup> Part 3 of the United Nations General Assembly Resolution 181 expounds on Jerusalem's unique status under the Partition Plan. While Jerusalem was to remain independent, section 3.C.11 stated that Arabs and Jews residing in the City of Jerusalem could sign a notice of intention to become citizens of their respective national states (the Arabs of the Arab state and the Jews of the Jewish state) and vote in their respective states. Additionally section 3.D read that the plan would remain in force for a period of ten years, unless a council found it necessary to reevaluate this time frame, and envisioned changes to the status of Jerusalem at this time (UN General Assembly Resolution 181).



an international one. As soon as the British Mandate ended and the State of Israel was officially established, the armies of seven neighboring Arab countries invaded the new state, joining Palestinian Arabs in the fight against Israel. The war, the longest and largely considered Israel's most difficult, "is etched in contemporary Jewish memory as a war to the finish, fought for the nation's very existence, whose success was due to total mobilization, endless sacrifice and risk of life, and very many casualties" (Shapira 158). Approximately six thousand Israelis (about 1% of the Jewish population at the time) were killed, and in the eyes of the new Israeli people, victory secured state legitimacy (158-160).

Contrarily, Palestinian society and its governance collapsed throughout the course of the war, leading to the mass flight of Palestinian Arabs. From December 1947- September 1949, 600,000-760,000 Palestinians left, ran away, or were expelled from the territory of the State of Israel, leaving approximately 370 villages empty. Perhaps some Arabs believed that evacuation was only temporary and that their property would be returned to them when the Arab states' had won the war. But at the time, many Arab inhabitants, especially those residing in mixed-population cities, fled for fear of the war and the Jewish state (Benvenisti and Zamir 297).

Meanwhile, the Israeli High Command prioritized holding Jewish property and settlements throughout the war, issuing the "Tel Hai Order" to ensure that Jews did not vacate their property out of fear. The order stated that no Jewish settlements should be abandoned and that women and children would be evacuated from their residences only on the orders of the local commander. While some failed to heed these instructions (some 60,000 Jewish refugees left their homes and about one-third of Jerusalem's Jewish population left the city despite contrary orders issued by the Haganah and the city's military governor), the High Command's position certainly reflected concern for the maintenance of Jewish land (Shapira 158-159). Not only were the new

Israelis willing and able to fight for their new state, they would not easily cede land that they believed was rightfully theirs.

Military conflict in the 1948 Arab-Israeli war ended with the signing of a series of bilateral armistice agreements dividing former Mandate Palestine into three territorial units: the Gaza Strip (under Egyptian jurisdiction), the West Bank (under Jordanian control), and the State of Israel (Shapira 170-172). While Zionists had only managed to acquire 6.6 percent of the land area of Palestine/ Eretz Yisrael prior to 1948, the largest part of the territory in question was to be held by the State of Israel as a result of the war. The Israeli armistice agreement with Jordan rejected the arrangement for Jerusalem sought by the international community under the United Nations Partition Plan. It instead divided the city of Jerusalem between the two countries, creating Eastern Jerusalem, which was to be under Jordanian control, and Western Jerusalem, which was to be under Israeli jurisdiction (Shapira 170-172).

While these agreements concluded the war, they nevertheless resulted in massive property displacements for both Arabs and Israelis. Palestinians who fled their homes that were located within the Green Line (the demarcation line which outlined Israel's recognized area under in the 1949 armistice agreements) and either moved abroad or became displaced refugees during the war greatly lost their property to Israeli control. According to official Israeli records, Palestinian refugees left behind approximately 3,250 square kilometers of agricultural lands and many deserted homes and buildings. As more and more Jewish immigrants who had survived the Holocaust or moved to Israel to escape rising trends of anti-semitic actions in neighboring Arab countries found refuge in the new state, many occupied these vacated properties, making it impossible for the displaced refugees to return. On the other side of this conflict, a significant portion of Jewish lands that had been purchased by the Zionist movement during the time of Zionist settlement also fell under Jordanian or Egyptian control. Although most of the lands

owned by Jews (either privately or by the Zionist organizations) were in areas that became part of the State of Israel in 1948, between thirty and forty square kilometers of land and several hundred buildings owned by Israelis were located in the territories occupied by Jordan and Egypt (Benvenisti and Zamir 297- 298).

During the War of 1948, Israeli leadership enacted the Absentee Property Law under Emergency Regulations law in order to regulate the enlarged land area it found under its control as a result of combat and resistance. It was modelled on the British Trading with the Enemy Act of 1939, an ordinance which included special provisions detailing how to handle enemy property that fell under the control of British forces during military conflict. The British Trading with the Enemy Act, and therefore the Israeli Absentee Property Law too, was based on the concept that a country's wealth, which may be used for its war effort, includes not only the property situated in its territory, but also its property and that of its citizens located abroad. For this reason, this act holds that enemy assets that fall under British control during a time of war must be placed in trust and held by a Public Trustee until an agreement of peace could be made. Following the British model, the wartime Absentee Property Law thus allowed the State of Israel to appoint a Custodian (Israel's version of a Public Trustee) in order to preserve the enemy property that fell into its hands during the Israeli War of Independence and prohibit it from being reclaimed by enemy states until an arrangement was made at the time of peace (Ben-Hillel 12).

At the conclusion of the War of 1948, however, Israel did not return the property that fell within the Green Line to individuals it considered absentees. Instead, the fledgling Knesset ratified the Absentee Property Law into the new Israeli legal system in 1950, replacing the 1948 version which had been enacted under Emergency Regulations law with an Israeli statute. According to the Absentee Property Law of 1950, any person who, at any time between November 29, 1947 and September 1, 1948, "was a national citizen of one of the Arab countries

fighting against Israel, or was in one of those countries, or had left his or her ordinary place of residence in Eretz Yisrael (Palestine) for a place outside Eretz Yisrael or for a place in Eretz Yisrael held at the time by forces that were fighting against the state of Israel” is considered an absentee (Benvenisti and Zamir 300). Absentee property, therefore, refers to any property (excluding movable property) whose legal owner was defined as an absentee during the relevant timeframe (300).

According to the Absentee Property Law, absentee property is transferred to the Israeli government automatically. All property that falls under the definition of absentee property immediately becomes vested in a state department known as the Custodian of Absentee Property, and at this time, the Custodian is granted extensive ownership powers (Ben-Hillel 21). Under the Law, the courts have recognized the Custodian’s powers to “order the eviction of someone who is occupying the property without any right” (HCJ 5931/06, para. 14). Further, the courts have recognized that the Custodian’s acquisition of absentee property is immediate upon its classification as such. No actions need to be taken by the government for absentee property to be vested in the Custodian. This aspect of the law has allowed the Custodian to seemingly arbitrarily expropriate specific properties which fall under the definition of absentee property multiple years after their initial classification as absentee property (as is the cases of Hussein and Azat and the Ayad family). Additionally, unless the absentee in question is a citizen or permanent resident of Israel, neither the Custodian nor any other government organization is obligated to provide any form of compensation for the absentee property that it expropriates and it often does not rectify the loss of this property in any way (Ben-Hillel 21).

The Custodian's powers are technically limited by article 19 of the Absentee Property Law which establishes that the Custodian is not permitted to sell property or otherwise transfer its ownership to any other individual or entity. Nevertheless, the Law subsequently allows a new

public body named the Development Authority, which is then registered in the land registry as the owner of the property, to provide the land to other entities by way of long term lease. Even though the Development Authority may not officially sell the property or transfer the title to any other person, it still allows the state to develop and use absentee property for its own purposes (Ben-Hillel 10). The 3,250 square kilometers of Palestinian agricultural lands, deserted homes, and buildings left behind during the War of Independence were therefore expropriated by the State of Israel under the Absentee Property Law, legally passing the property rights to the State Custodian which then provided this land to the Development Authority for state construction, agriculture, and otherwise general use. The Absentee Property Law thus provided the effective means for the State of Israel to undermine the property rights of all individuals who fell into the category of absentees under the Law following the War of Independence. Yet the Absentee Property Law not only applied during the state's founding. It has also been increasingly used by the state in recent years to expropriate property in East Jerusalem.

On June 5, 1967, war again broke out between Israel and its Arab neighbors. In only six days of fighting, Israel was "transformed from an underdog under threat of destruction to a regional power whose positions had to be taken into account" (Shapira 302). The Six-Day War, Israel's greatest victory in terms of land acquisition, resulted in the State's control over the Sinai Peninsula, the Gaza Strip, the West Bank of the Jordan river, East Jerusalem, and the Golan Heights. This outcome, however, presented a plethora of new problems for the state. New, urgent questions surfaced about the status of East Jerusalem and the areas which had previously been under Jordanian and Egyptian control. In the end, while Israel imposed occupation and military governments in the Occupied Territories, Israel unilaterally applied Israeli law, jurisdiction, and administration to East Jerusalem. The state sought to incorporate this area within the Israeli

municipality of West Jerusalem and unify the Holy City under the jurisdiction of the State of Israel (Shapira 304-307).

It is important to recognize that many dispute East Jerusalem's legal status. According to the Israeli government, East Jerusalem falls under Israeli control due to a series of administrative enlargements decided by Israeli municipal authorities at the conclusion of the Six-Day War and has rightly been occupied by Israel since 1967. On July 30, 1980, Israel's Knesset passed Basic Law: Jerusalem, Capital of Israel which, combined with an amendment adopted two decades later, declared "that the city will remain unified in the borders that the Israeli government determined following the Six-Day War, and that no part of the city may be transferred to a foreign government or body" (Green). The Knesset also declared the complete and united Jerusalem to be the capital of Israel under this law.

However, Palestinians believe that East Jerusalem remains their territory based on the 1949 Armistice Agreements that concluded the Israeli War of Independence. Further complicating the matter, the Palestine Liberation Organization's Palestinian Declaration of Independence of 1988 proclaimed Jerusalem as the capital of the State of Palestine (Samuelson). Israel's present role in East Jerusalem has been considered illegal under international law and has been condemned by the UN as well as other international bodies. One month after the ratification of Basic Law: Jerusalem, the United Nations Security Council passed resolution 478 which declared the Basic Law null and void in the international arena and called on the closure of UN member states' embassies within Jerusalem (Green). Additionally, on July 9, 2004, the International Court of Justice issued an advisory opinion stating that Israel's construction of the Israeli West Bank barrier between East Jerusalem and the Occupied Territories was "illegal" and "must stop immediately" because it "violated principles outlined in the UN Charter and long-standing global conventions that prohibit the threat or use of force and the acquisition of territory that way, as

well as principles upholding the right of peoples to self-determination” (“International Court of Justice”). Today, the Security Council does not recognize Israel’s actions and continues to view Israel as an unauthorized occupant of East Jerusalem. While Israel maintains that it has not annexed East Jerusalem, it has greatly enlarged the municipal boundaries of the city by adding some 28 Palestinian villages on East Jerusalem’s periphery to its legal jurisdiction (Green). While I bracket the issue of Israel’s authority in East Jerusalem for the scope of this paper and assume its legal control over the region, it nonetheless greatly affects the actions of the Israeli government, the language used in its laws, and the overall context within which Israeli law is applied.

When Israel claimed jurisdictional control of East Jerusalem, a problematic situation arose with regard to the Absentee Property Law. Because the Arabs residing in East Jerusalem had been residents of Jordan in the time between the War of Independence and the Six-Day War, almost all of the individual property in East Jerusalem would have instantly become absentee property as soon as the Law was applied to the region. Israel understood that the international community would not look lightly upon its actions if it were to expropriate all standing property from the Palestinians who had been living in the area and that this issue could greatly affect the international standing of Israel’s claim to sovereignty in East Jerusalem. Israel thus passed the Legal Regulation Law 5730 (1970) in order to rectify these concerns and assist with transitional arrangements in East Jerusalem.

Under the Legal Regulation Law, residents of East Jerusalem would not be considered enemies or enemy subjects for the purposes of Israeli law but would instead be given official residency. Further, article 3 of the Legal Regulation Law specifically exempted all residents of East Jerusalem who were physically present in the area on the date of a census from classification as absentee, therefore protecting their property in East Jerusalem from classification as absentee

property (Benvenisti and Zamir 309). However, for Palestinians who lived outside of the municipal boundaries of Jerusalem, but owned property inside the city limits or had left East Jerusalem for other reasons on this date, article 3 did not apply to them: “only residents who were physically present in East Jerusalem on the day of the annexation [were] not considered absentees... Those who were not excluded from the incidence of the law theoretically remained absentees” and the rights to their property were therefore annulled under the Absentee Property Law (“Absentees against Their Will” 1). The Legal Regulation Law therefore exempted some property owners in East Jerusalem from absentee status, but did not exempt others, based upon whether the owners were physically present in East Jerusalem on the date of the official census. If the original owners of the property in 1967 were not present on the census date, this property was expropriated by the Custodian under the Absentee Property Law and could be claimed by the state at any time. This is thus how the Absentee Property Law came to apply to the properties in the Ayad family case, the Hussein and Azat case, and to many other properties in East Jerusalem.

The Absentee Property Law therefore poses extreme tension to Israel’s democratic identity. A state’s appreciation of individual property rights reflects a recognition of that person’s power and sovereignty as an individual. It represents respect on behalf of the state for a person’s ownership and further defines the relationship between the individual and the state. According to John Locke’s *Second Treatise of Government*, a state’s respect for individual property reflects a covenant between the state and the individual such that the individual participates in the state for the purposes of one’s protection of that property: “the great chief end, therefore, of men’s uniting into commonwealths, and putting themselves under government, is the preservation of their property. To which in the state of nature there are many things wanting” (Locke 66). Locke’s account of state legitimacy is therefore reliant upon the protection of individual property.

Although Locke’s elementary account of property rights and state legitimacy fails to capture the



intricacies of contemporary state relations and especially overlooks the complications involved in Israel's relationship to its non-Jewish permanent residents, it nonetheless highlights the importance of a state's duty of property protection. A state should not breach the individual property rights of the residents for which it cares most without extremely compelling reasons. Violations of property rights therefore stress a state's democratic values because they signify unequal respect and protection under the law and in the eyes of the state and society.

Further, if property rights are an extension of one's liberty, their defilement destroys an individual's freedom to choose her own ends and future. According to Immanuel Kant, the universal principle of a right is a person's freedom to choose and realize her own ends, subject to the free and equal ability of others to do the same. A person is human insofar as she has the ability to express free will: "This is the independence of a person in relation to others. In order to enjoy this freedom of choice, law grants people the ability to attain acquired rights, such as property and contracts. In order to enjoy these rights, a state and governmental institutions are needed to establish, interpret and enforce the rights and duties of its members" (Barak, *Human Dignity* 27). However, when the State of Israel expropriates property under the Absentee Property Law, the state not only violates former property owners' freedom to do with their property what they please but also obliterates those individuals' entire claims to ownership. The state not only constricts freedom of choice with regard to a person's control over her property; it destroys that freedom altogether, violating one's rights that according to Kant are most essential to personhood. The Absentee Property Law therefore violates human dignity and Israel's democratic identity, and it is to this strain that which we will turn next. We will examine Israel's identity as a democratic state through the context of its constitutional scheme and the state's protection of individual rights.

## **Israeli Constitutionalism: A Time-Stamped Defense of Human Dignity and Civil Liberties?**

Israeli constitutional law grew from the tradition of British law that it had inherited from Mandate Palestine (Sapir, Barak-Erez, and Barak 1). Although all formal constitutional ties with Great Britain were abolished after end of the mandate, Israel preserved 99 percent of the elements of the former system for many years after it became a state. One of the most notable of these residual structures is Israel's establishment of legislative supremacy, which was based upon both the British model and an adoption of the Zionist Congress into Israel's young government (Dotan 99).

As articulated in the Declaration, Zionist leadership originally intended for the state to develop a written constitution no later than the 1st of October, 1948. Elections for the constituent assembly were held as soon as Israel's War of Independence ended on January 25, 1949, and the fledgling state's electorate expected to help draft a formal constitution. However, due to extreme internal disagreement and polarity, a constitution was never created. Eventually, Israel's first Prime Minister, Ben Gurion, openly argued against the creation of a formal written constitution. His concerns found a significant amount of support amongst religious representatives of the Knesset who objected to a constitution because they were worried that it would be too secular (Rubinstein).

In June of 1950, a compromise was reached to prepare a draft of a constitution that would consist of separate chapters, each chapter consisting of a Basic Law. The compromise, known as the Harari Decision, passed by a vote of 50 to 38 and held that each of the chapters would be presented to the Knesset for ratification. Eventually, all of the chapters would be consolidated into one Israeli Constitution. The gradual process aimed to enable the Knesset to first address less controversial rights and enumerate them on the constitutional scale while postponing discussions about more controversial ones to a later time (Brandes 267). The Harari Decision, however, was

vague. It was unclear whether the Knesset intended to enact a constitution by installments that would be binding only after its completion or whether each Basic Law would instead have normative supremacy above ordinary legislation on its own (Rubinstein).

Among the issues considered problematic was the notion of equality. Many religious members of the Knesset viewed equality as potentially conflicting with central aspects of Israel's Jewish identity and fought to defend this principle from constitutional enumeration. Largely for this reason, the first nine Basic Laws addressed only institutional aspects of Israeli government and on the whole stayed clear of state values and basic rights. In order of ratification, the first Basic Laws dealt with the Knesset (1958), Israeli lands (1960), the president (1964), the government (dealing with the cabinet) (1968), the state economy (1975), the army (1976), the Jerusalem Law (establishing the entirety of Jerusalem as Israel's capital) (1980), the judiciary (1984), and the state comptroller (1988). Although Basic Law: Jerusalem, the Capital of Israel could be seen as articulating Zionist values to unite the city under Jewish control, therefore specifically acting on behalf of Israel's identity as a Jewish state, the intention of these first nine Basic Laws was mainly to lay the structural basis of government functionality and in most cases only served to formally articulate existing norms of government procedures (Sapir, Barak-Erez, and Barak 2). Further, in addition to their structural natures, the initial nine Basic Laws could technically be amended or repealed by a simple majority in the Knesset, unless the Basic Law had specific conditions for its modification.<sup>3</sup> This was true even of legislation that conflicted with the established Basic Laws (Rubinstein).

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<sup>3</sup> Articles in the first nine Basic Laws including specific conditions include article 4 of the Basic Law: the Knesset, which requires an absolute majority of 80 votes for alterations to the system of electing the Knesset members and article 44 of the same Basic Law, which also requires an absolute majority to prevent the amendment of the law by means of the Emergency Regulation. All other articles of the Basic Laws could be amended by a simple majority in the Knesset (Rubinstein).

Until 1992, Israel's democratic principles were mostly protected through the judiciary, which earned a reputation for being the Israeli guardian of basic rights. Before 1992, the High Court of Justice attempted to uphold Israel's democratic principles to the best of its ability, given its limited powers and authority. The Supreme Court identified a list of judicially recognized fundamental rights and fought to protect these rights procedurally. However, its efforts were only partially successful due to the fact that the fundamental democratic principles recognized by the courts were not considered binding on the Knesset. While the judiciary was able to rely on the democratic principles set forth in the Declaration to uphold human rights, there was little the courts could do to protect against explicit statutory infringement of these rights or democratic principles. Due to parliamentary supremacy, the Knesset could pass legislation that severely contravened the state's own democratic identity, and if the court attempted to procedurally check the legislature, the court's rulings could be overturned by further undemocratic legislation (Sapir, Barak-Erez, and Barak 2).

This entire scheme of Israeli constitutionalism changed, however, when the Knesset enacted Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation in 1992. This change was so significant that, for many, the enactment of these laws rendered a "constitutional revolution" in Israel. For the first time in Israel's short history, the state's basic democratic principles and values were fortified within a Basic Law, for as the first clause of Basic Law: Human Dignity and Liberty explicitly states, "the purpose of this Basic Law is to protect human dignity and liberty, in order to establish in a Basic Law the values of the State of Israel as a Jewish and democratic state." Amongst the freedoms explicitly protected by the Basic Law are the preservation and protection of life, body, and dignity; the preservation of property; the protection of personal liberty; the freedom to leave and enter Israel; the right to privacy; and the right to confidentiality. The full scope of the Basic Law has been recognized to stem beyond these

enumerated rights and grant protection of some unnamed rights as well (Brandes 267-268).

Nevertheless, we need not concern ourselves with the full scope of human rights protected by the Basic Laws for the purposes of this paper. We are concerned with the state's treatment of property rights, and clause 3 expressly states, "there shall be no violation of the property of a person."

There is therefore no question as to whether the Basic Law protects property rights; it does so explicitly. But many questions do remain. If we are to grasp how this new Basic Law affects the Absentee Property Law, we must understand who is protected by this Basic Law and from whom or what entities are these individuals protected. We must further discern the extent of these rights and determine whether and when there may be circumstances in which the state may justifiably act against the Basic Law and still infringe on the rights protected by the Basic Law.

Regarding who this law protects, the amendment to the Basic Law: Human Dignity and Liberty (5752-1992) affirms that "fundamental human rights in Israel are founded upon recognition of the value of the human being, the sanctity of life, and the principle that all persons are free; these rights shall be upheld in the spirit of the principles set forth in the Declaration of the Establishment of the State of Israel." Given this universal, humanitarian language, former Justice Aharon Barak found that it is of no importance under the Basic Law whether the individual in question is a citizen of Israel, a resident of Israel, or a resident of an Occupied Territory:

[t]he right to human dignity is the right of every person as a human being. Young and old, man and woman, physically and psychologically healthy or ill, prisoner, detainee and upstanding member of society, citizen or resident of Israel or foreigner, each of them has the right to human dignity. Indeed, the person's very birth grants them the right to human dignity. (Barak, *Human Dignity* 301)

For Justice Barak, it makes no difference that the Ayad family, Hussein and Azat, or any other individuals living in Israel are permanent residents of Israel rather than citizens. Under the principle set forth by the Basic Law, their property rights should be just as protected as those of

citizens. Any other interpretation would undermine the principle set forth in the amendment that states that these rights derive from “the value of the human being” and the “sanctity of human life.”

In response to the second question, clause 11 of the Basic Law reads, “all governmental authorities are bound to respect the rights under this Basic Law.” In *Commitment to Peace and Social Justice v. Minister of Finance* (2005), then-Justice Barak wrote,

[T]he Basic Law does not merely declare “policy” or “ideals” (cf. art. 20(1) of the Basic Law of Germany). The Basic Law does not merely delineate a “plan of operation” or a “purpose” for the organs of government (cf. art. 27(2) of the constitution of South Africa; art. 39 of the constitution of India). It does not merely provide an “umbrella concept” with interpretive application... Sections 2 and 4 of the Basic Law[: Human Dignity and Liberty] provide a right-- a right that guarantees human dignity. The right corresponds with the duty of the organs of government to respect it (HCJ 366/03).

While arguments continue as to whether the principles set forth in this Basic Law extend beyond governmental authorities and into the private sphere, these questions are beyond our purposes in this paper. The Basic Law was enacted for the purpose of defending the rights protected by human dignity against governmental power, and therefore, the state’s expropriatory actions under the Absentee Property Law should be scrutinized under the Basic Law’s protections.

In 1995, the President of the Israeli Supreme Court, Justice Barak, asserted that the courts must have the power to enforce the state’s new commitments to human dignity. Writing on behalf of the Court in *United Mizrahi Bank v. Migdal Cooperative Village* (1995), Barak championed an extremely activist interpretation of the two new Basic Laws. He asserted the Israeli courts must have the implicit power to protect human dignity and liberty against statutes enacted by the Knesset and render determinate violations of protected rights under the limitations clauses.<sup>4</sup> The

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<sup>4</sup> Clause 4 of Basic Law: Freedom of Occupation states, “[t]here shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required.” Clause 9 of Basic Law: Human Dignity and Liberty (reproduced and explained in succeeding paragraphs) states, “there should be no restriction of rights under this Basic Law held by persons serving in the

Court held that since the rights included in these two laws are safeguarded by limitations clauses that constitute substantive entrenchment of the laws, the enactment of these Basic Laws signified the elevation of the Basic Laws to supremacy over ordinary legislation. Because both Basic Laws contained language that prohibited the state from violating the protected rights--except in rare cases--the courts must have the power to declare legislation contrary to the 1992 Basic Laws invalid and discern the line between appropriate and inappropriate violations of the Basic Law. *United Mizrahi Bank* thus established the practice of judicial review in Israel, despite the intended supremacy of the Knesset and the lack of explicit language heightening the status of the Basic Laws above ordinary legislation. Barak asserted that the courts therefore have the power to determine when legislation may be required in violation of the principles of the Basic Law for the immediate protection of the Jewish state. These Basic Laws further allowed the courts to recognize the possibility of an invalid constitutional amendment. While it was previously possible for a Basic Law to be amended by a regular law, the Court held that every amendment of a Basic Law must be on the level of Basic Law. The courts were therefore given the power to rule on the validity of the normal statutory law in light of the Basic Laws ("Israel Supreme Court").

On the surface, the Absentee Property Law is an egregious violation of Basic Law: Human Dignity and Liberty. Under the Absentee Property Law, the state obliterates absentees' settled expectations about what one has a right to claim and use as her own and shows no regard for her personal attachment to her home and land-- instead expropriating this land without the required provision of compensation and using it for the state's own development purposes. The Law allows for precisely that which the state prohibits under the Basic Law: Human Dignity and

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Israel Defense Forces, the Israel Police, the Prisons Service and other security organizations of the State, nor shall such rights be subject to conditions, except by virtue of a law, or by regulation enacted by virtue of a law, and to an extent no greater than is required by the nature and character of the service." Together, these clauses make up the limitations clauses.

Liberty, the government's own disregard and destruction of fundamental aspects of human dignity and the violation of explicitly enumerated rights.

Further, Absentee Property Law also threatens to subvert Israel's democratic identity because of its sweeping and strict wording. Under the broad definition of absentee, the Absentee Property Law has resulted in the loss of property for all Palestinians who had lived within the Green Line and left their property between November 29, 1947 and September 1, 1948-- even those who returned to Israel shortly after leaving it and subsequently became Israeli citizens (Benvenisti and Zamir 300). The Absentee Property Law is also precarious because there is no foreseeable end to absenteeism. Due to the fact that Israel's declared state of emergency persists, any property purchased in the State of Israel today by an absentee will still be regarded as absentees' property and will immediately be vested in the Custodian. Additionally, a person will be considered an absentee under the law simply because, at some stage during the period from the end of 1947 to September of 1948, he or she was a national or citizen of Lebanon, Egypt, Syria, Saudi Arabia, Trans-Jordan, Iraq, or Yemen or resided in any of these countries. While individuals can apply to annul their absentee status through written confirmation or the release of absentees' property, this process is extremely difficult and is usually unrecognized by the state, especially if one identifies as an Arab (HCJ 5931/06, para. 18-19). The Absentee Property Law therefore undermines the human dignity of all those who fit the definition of 'absentee' by denying secure property protection to a certain ethnic group by virtue of their nationality or location during the War of Independence. This unequal protection and unequal classification as absentee property therefore forsakes Israel's democratic identity and subverts the protections of the Basic Law. So if Basic Law: Human Dignity and Liberty is supreme, why have the courts not rendered the Absentee Property Law invalid?



This question can be answered by the third question which I posed above, exploring instances in which the state may lawfully act against the rights enumerated in the Basic Law. Rights protected by the Basic Law cannot be of entirely invulnerable status. Surely, there are instances in which the government may violate basic rights explicit in the Basic Law in order to protect the very preservation of the state, such as during times of war. Although these instances should be extremely limited and viewed with the utmost scrutiny so that they only impair rights to the extent necessary for the state's fundamental preservation, there are nonetheless occasions in which states must violate individual liberties for the conservation of the state and its most fundamental values.

In fact, this is precisely what clause 9 and clause 12 of Basic Law: Human Dignity and Liberty state. According to clause 9,

there should be no restriction of rights under this Basic Law held by persons serving in the Israel Defense Forces, the Israel Police, the Prisons Service and other security organizations of the State, nor shall such rights be subject to conditions, except by virtue of a law, or by regulation enacted by virtue of a law, and to an extent no greater than is required by the nature and character of the service.

Further, clause 12 adds that the denial or restriction of rights may be enacted under emergency regulations when a state of emergency exists, "provided the denial or restriction shall be for a proper purpose and for a period and extent no greater than is required." Together, these clauses make up the limitations clauses of Basic Law: Human Dignity and Liberty. They show that the Basic Law recognizes and allows for conditional violations of any of the rights protected under the Basic Law in clear instances in which Israel can and must infringe on its own recognized democratic rights for the preservation of the state, so long as they are enacted "by virtue of a law... and to an extent no greater than is required by the nature and character of the service." These clauses together render the state accountable for its infringements on basic rights. As underscored by the language of the Basic Law, these cases must be limited by displayed necessity

and restricted only to the minimal violations of these rights required to achieve the state's fundamental purposes.

But what constitutes necessity in these circumstances? Should the Absentee Property Law be deemed essential to the preservation of the state, despite its violation of human dignity and therefore the state's democratic identity? In succeeding sections, I will argue that when scrutinized under a balancing test of necessity as articulated by clause 9 of Basic Law: Human Dignity and Liberty, Israel's use of the Law in 1948 and later ratification of the law into an Israeli statute in 1950 is justified as imperative action based upon the state's immediate needs in extranormal emergency situations. Yet none of these conditions apply to the Law's application to East Jerusalem in 1967, and therefore, the state's application of this law to East Jerusalem should be rendered invalid under the Basic Law.

Nevertheless, we have thus far left out an extremely important wrinkle within the explicit text of Basic Law: Human Dignity and Liberty, for the judiciary's power to rule on the validity of laws is more complicated than it first appears within the Israeli constitutional system. The Israeli Supreme Court's powers of judicial review are not absolute but only prospective, due to the explicit restriction set out in clause 10 of Basic Law: Human Dignity and Liberty. This article, known as the Validity of Laws clause, expressly states, "[t]he Basic Law shall not affect the validity of any law in force prior to the commencement of the Basic Law." The courts therefore have been recognized to have the power to rule on the validity of Knesset legislation passed post-1992 but cannot declare a law enacted prior to 1992 invalid on constitutional grounds. In his book *Human Dignity: the Constitutional Value and the Constitutional Right*, former President of the Israeli Supreme Court Justice Barak explained the importance of the Validity of Laws clause:

The result [of this clause] is that the active application of the Basic Law cannot affect the validity of old law... The result is that all of the laws that were in effect on March 25, 1992 will continue to be valid, and their conflict with the provisions

of Basic Law: Human Dignity and Liberty cannot lead to their invalidation. However, when a new law amends old law, the validity of the new law is contingent on it comporting with the provisions of the Basic Law. The new law is not protected by the Validity of Laws clause. (306)

Thus, the Validity of Law clause places an extreme amount of stress on the entire Israeli constitutional scheme, for it appears as though the Basic Law both constitutionally allows for and in practice prohibits judicial action to protect human rights based upon the time of the statute's enactment. As Tamar Hostovsky Brandes highlights, "the 1992 Basic Laws were... not only born out of a political compromise, but also shaped by this compromise" (Brandes 267). Basic Law: Human Dignity and Liberty would not have passed were it not for the addition of this clause. Rightest and more religious parties in the Knesset specifically sought to protect old laws from judicial scrutiny and therefore entrenched the Validity of Laws clause into the Basic Law (Barak, *Human Dignity* 306-307). Nevertheless, the clause renders Israeli law incongruous with regard to Israel's protection of fundamental human rights and human dignity, creating discrepancy in the values the Israeli constitution purports to uphold. This inconsistency in the law has the potential to undermine Israel's democratic identity because it allows the state to defend human dignity and specific civil liberties only for legislation enacted after 1992. If the Validity of Laws clause can truly restrict the powers of judicial scrutiny in the name of defending human rights in Israel, the government will be allowed to fail to uphold its democratic identity for all laws passed before 1992-- drawing Israel's democratic principles into question.

The Validity of Laws clause affects the Absentee Property Law because it seemingly defends this Law from judicial scrutiny despite its clear violation of property rights protected under Basic Law: Human Dignity and Liberty. Since the Absentee Property Law originally passed in 1950, long before the establishment of Basic Law: Human Dignity and Liberty, a narrow reading of the Validity of Laws clause would insulate the Law from the Court's

invalidation, despite its conflict with the principles embodied in the Basic Law. However, there are alternative broader and more principle-based readings of the scope of the Validity of Laws clause which we will explore next and for which I will advocate. As we shall see, if the Basic Law is read to instruct a principle that protects basic human rights holistically, the court may be able to limit the scope of the Validity of Laws clause in the name of the greater principle embodied in the Basic Law and render aspects of the Israeli legal system more congruous in its defense of human dignity. This reading of the Validity of Laws clause is essential to Israel's existence as a democratic state and its ability to uphold its democratic constitutional promises because it will hold the state accountable to these principles and ensure that the state's violations of individual rights occur only for immediate necessity and not simply because of the date of the enactment of the law in question. If Israel is truly to be a democracy, the Validity of Laws clause cannot be read to timestamp and restrain the state's protection of human dignity and human rights. Rather, these democratic principles must flow throughout the entirety of Israeli jurisprudence, allowing the state to speak with one voice in the name of its founding democratic creed.

### **Interpreting the Validity of Laws Clause Broadly**

This question regarding the scope of the Validity of Laws clause divided the High Court of Justice in *Hussein v. Cohen* (2015), the case that ultimately led to the application of the Absentee Property Law to East Jerusalem via the claims of the Ayad family's and Hussein and Azat's properties. The Opinion of the Court, written by the former President of the Israeli Supreme Court, Asher Grunis, acknowledged that significant geopolitical changes have occurred in the state since the time of the Absentee Property Law's enactment in 1950, the most significant

of which was Israel's ratification of Basic Law: Human Dignity and Liberty. Nonetheless, the Opinion of the Court held that due to the Validity of Laws clause, the Court was prevented from determining the validity of any law enacted prior to 1992, including the Absentee Property Law. Regardless of whether the Absentee Property Law meets the constitutional criteria, the Court held that article 10 of the the Basic Law itself "does not make it possible to find that any of the [Absentee Property] Law is void" (HCJ 5931/06, para. 20).

The Court instead championed a procedural approach to the future application of the Absentee Property Law in East Jerusalem, allowing the Court to partially uphold the state's democratic identity without determining the Absentee Property Law valid or invalid. Instead of appealing to constitutional principles apparent in the Basic Laws, the Court did the opposite, grounding its ruling "at the administrative level" by creating a series of systematic checks in order to practically restrict the State's power of expropriation under the Absentee Property Law in East Jerusalem to new cases (HCJ 5931/06, para. 39). As of the date of the ruling in April of 2015, any act in accordance with the Absentee Property Law's application to East Jerusalem would "necessitate obtaining prior authority from the Attorney General himself, together with a decision of the Government or its ministerial committee approving the same" (HCJ 5931/06, para. 32). However, for all of the absentee property in East Jerusalem where the Custodian has already claimed rights to the land, the Court clarified that its ruling would not affect these cases (HCJ 5931/06, para. 39).

While this procedural restriction seeks to hinder the state's future use of the Absentee Property Law in East Jerusalem, it is nonetheless insufficient given Israel's democratic identity under the principles set forth in the Basic Laws. The Court's ruling fails to uphold human dignity as an overarching constitutional value that protects human dignity in all instances which are not vital to the state's imminent need to violate specific rights for justifiable reasons. Although the

Court's procedural approach may restrict the frequency with which the Absentee Property Law may be applied to properties in East Jerusalem, the ruling nonetheless subjects an individual's property rights to the determination of Israeli government officials who may decide to infringe upon these rights whenever 'convenient' for the expansion or development of the state--undermining the very protection guaranteed under the Basic Law.

Thus, even the Court's procedural approach--which is specifically aimed at curbing the state's use of the Absentee Property Law and upholding the state's democratic principles to the extent possible without ruling on the Law's validity--allows the state to arbitrarily protect the rights explicit in the Basic Law based upon the will of government officials. If Israel's democratic identity is to remain consistent so as to fully protect rights implicit in Basic Law: Human Dignity and Liberty from state encroachment, the Validity of Laws clause must instead be read broadly. For even when compounded with judicially enacted procedural checks, the narrow reading of the clause maintains a incomplete and contradictory legal scheme whereby Israeli jurisprudence and its articulation of Israel's democratic identity remains incongruous and dependent on the desires of political leaders.

For this very reason, in order to uphold Israel's democratic principles as a democratic state that constitutionally protects various human rights from the wills of government officials and institutions, Justice S. Joubbran and Deputy President E. Rubinstein disagreed with the Opinion of the Court's interpretation of the Validity of Laws clause. They argued that one must interpret Basic Law: Human Dignity and Liberty holistically to reflect the greater principles enshrined in the law, therefore upholding the integrity of the entire legal framework. In so doing, they expressed that it is possible and desirable for the Court uphold human dignity in this ruling by using the principles grounded in Basic Laws as a mechanism in the interpretation of old

legislation against the background of Israel's whole legal history--thereby confirming and defending Israel's democratic principles throughout the entire scheme of Israeli law.

As the American philosopher and jurist Ronald Dworkin explains in his work *Law's Empire*, a state's legal system speaks with integrity when it "fixes its gaze on the matters of principle... [and] speaks with one voice about what... rights are [protected,]... so not to deny them to anyone at any time" (Dworkin 223). According to Dworkin, integrity requires that laws are consistent with the principles championed by the state. A narrow reading of the Validity of Laws clause is therefore in direct tension with the principle of integrity within the Israeli legal system, as it only allows the judiciary to determine the validity of laws passed following 1992. Under the narrow interpretation of the Validity of Laws clause, if a statute was passed after the enactment of Basic Law: Human Dignity and Liberty, the courts have the power to use judicial review to protect human dignity and render laws in violation of such fundamental human rights invalid. However, if the law was passed prior to 1992, the courts do not have this power.

The narrow reading of the clause thus creates a legal scheme ridden with what Dworkin terms "checkerboard solutions," whereby the law "treats a community's public order as a kind of commodity to be distributed in accordance with distributive justice, a cake to be divided fairly by assigning each group a proper slice" due to legislative compromise (Dworkin 178-179). Although these solutions perhaps allow for a legal system reflecting 'fairness' in terms of the representation of the desires of various political parties under law, they do not reflect congruity of principle. These solutions might allow each political group in the Knesset to see the policies it desires upheld in law (allowing Basic Law: Human Dignity to pass with the express provision of the Validity of Laws clause in order to satisfy the more rightist and religious parties), but the law upholds no principle because the legal system says two different things about the state's support for rights protected under the Basic Law based upon the date of the law's enactment (179-181).

Prioritizing the legislative compromise behind the enactment of Basic Law: Human Dignity and Liberty when interpreting the scope of the Validity of Laws clause therefore poisons Israel's own legal articulation of its democratic identity. The Validity of Laws clause allows the State of Israel to say two very different things about the state's principle of protecting human dignity and liberty, drawing the state's protection of these rights into question. Dworkin holds that while

each point of view must be allowed a voice in the process of deliberation, [for a state to hold a principle or value,] the collective decision must nevertheless aim to settle on some coherent principle whose influence then extends to the natural limits of its authority. If there must be a compromise because people are divided about justice, then the compromise must be external, not internal; it must be a compromise about which scheme of justice to adopt rather than a compromised scheme of justice. (Dworkin 179)

Thus, on Dworkin's framework, Israel either values human dignity on a constitutional level, or it does not. If Israel truly values human dignity and seeks to protect specific rights from state encroachment, then all enacted statutes in the legal scheme should flow from an overarching understanding of these principles. And judges, when contributing to the state's legal story, should interpret statutes so that they better reflect the purpose and best interpretation of the legal system as a whole (337). If Israel truly is a democracy that protects specific enumerated rights based upon their intrinsic value to the state's constitutional recognition of the value of human dignity, Israeli jurisprudence must speak with one voice and do so in every circumstance, not just post-1992. Israeli courts must interpret the Validity of Laws clause broadly in order to maintain a coherent legal framework that reflects the state's democratic commitment to human dignity and human rights--therefore fully upholding Israel's Jewish identity.

Former President of the Court Aharon Barak centered his understanding of a constitutional scheme with both the Basic Law: Human Dignity and Liberty and its Validity of Laws clause upon these grounds. He wrote that the Validity of Laws clause is unhealthy for a legal system and



that its inconsistency ought to be resolved if Israel is to have a valuable modern democratic constitution:

The Validity of Laws Clause created a unique legal situation, in which two legal systems-- old and new-- exist alongside each other, without one of them changing or annulling the other. This normative array is the product of a political compromise. However, it creates a constitutional anomaly. It is not healthy for a legal system when one part of it (the old part) is not subject to constitutional scrutiny, whereas the other (new) part is subject to such scrutiny. A legal system aspires to harmony and unity. The Validity of Laws Clause disturbs that harmony and unity. Indeed, modern democratic constitutions do not include a provision on validity of old laws; quite the opposite. They are based on a break from the past, and the recognition of a better present and future. (Barak, *Human Dignity* 306)

Further, in his opinions, former President Barak held that in order to maintain the integrity of the Israeli legal system, the Validity of Laws clause should be interpreted in light of the principles articulated by the entire Basic Law. In the seventh paragraph of President A. Barak's opinion in *Ganimat v. State of Israel* (1999), he wrote,

[t]he constitutional status of the Basic Law radiates to all parts of Israeli law. This radiation does not pass over the the old law. It, too, is part of the State of Israel's law. It, too, is part of the fabric. The constitutional radiation that stems from the Basic Law affects all parts of Israeli law. It necessarily influences old law as well. In truth, the validity of the old law is preserved. The radiation of the Basic Law upon it is therefore not as strong as it is upon new law. The latter might be avoided if it is contrary to the provisions of the Basic Law. The old law is protected against avoidance. It has a constitutional canopy that protects it. However the old law is not protected against the new interpretive perspective with regard to its meaning. Indeed, with the enactment of the Basic Laws on human rights there has been a material change in the field of Israeli law. The law is a set of interrelated tools. Changing one of those tools affects them all. It is impossible to distinguish between old and new law as regards the interpretive influences of the Basic Laws; all judicial discretion that is granted in accordance with the old law should be exercised in the spirit of the Basic Laws; and in this contest, every statutory norm should be interpreted with the inspiration of the Basic law. (CA 537/95, opinion of President A. Barak, para. 7)

Justice Joubbran applied former Justice Barak's logic when interpreting the validity of the Absentee Property Law in *Hussein v. Cohen*. He stated,

the Basic Laws give the judge an appropriate tool of interpretation when questions of interpretation in respect of the provisions of the law arise. The Validity of Laws provision in section 10 of Basic Law: Human Dignity and Liberty provides that

...so long as there was existing law prior to the commencement of the Basic Laws, its validity is preserved. However, in my opinion it is not to be inferred from that provision that the Basic Laws are not to be used as a tool for the interpretation of existing law when that law is not clear and its validity is in any event dubious. The Basic Laws have given our legal system an arrangement of fundamental principles, which I believe can, and frequently should, be referred to when we are reviewing the proper interpretation or legal policy. ( H CJ 5931/06, opinion of Justice S. Joubran, para. 2)

For Justice Joubran, as for former President Barak, the Validity of Laws clause must be interpreted in the broader framework of the Basic Law and the state's foundational principles. On these grounds, Justice Joubran found that the Court may and perhaps even must interpret all legislation, regardless of the time of enactment, in light of the principles and rights implicit in the Israeli constitutional scheme.

This approach expresses an appeal to integrity within the Israeli system rather than a constriction of the limiting power expressed in the Validity of Laws Clause: "in the event that a question of interpretation arises in respect of the provisions of the law, recourse should be made to the Basic Laws, and inspiration drawn from them" (Opinion of Justice S. Joubran, H CJ 5931/06, para. 3). On this approach, the Court does not disregard the Validity of Laws clause. Rather, the broader reading understands that Israeli law ought to be interpreted in light of the full scheme of Israeli principles, giving "substance to the principles and rights that are under consideration in existing legislation, and properly analyze the balance between them" (Opinion of Justice S. Joubran, H CJ 5931/06, para. 3). Justice Joubran's holistic approach to interpreting the Validity of Laws clause thus simply provides a mechanism for overlooking the clause's time-sensitive restrictions. Laws enacted before 1992 must also be fully weighed within Israel's articulated constitutional values. They too must fit within Israel's democratic identity that secures specific rights based in one's dignity as a human being and recognizes that only very extreme and narrow violations of these rights may be legitimate under the limitations clauses within the Basic Laws. The broader reading of the Validity of Laws clause seeks not to invalidate all undemocratic

laws. As we shall see in the following section, in which we explore the application of the broad reading of the Validity of Laws clause within Israel's constitutional scheme and its application to the Absentee Property Law, the principles implicit within the Basic Laws provide protections against the invalidation of all laws imperative to the very preservation of the state and its unique national identity.

Former Deputy President E. Rubinstein concurred with Justice Joubbran, but with an interesting twist. On the one hand, he agreed with the interpretation of the Validity of Laws clause supported by Justice Joubbran, reiterating that in principle, the foundational rights protected by the Basic Law radiate to all parts of Israeli law and that the clause should therefore be interpreted in light of these more paramount principles. He further highlighted that the Court explicitly established the principle of interpreting property law in Israel in context of larger Israeli values in *United Mizrahi Bank*, which held, “[w]ith the enactment of Basic Law: Human Dignity and Liberty[,] the normative weight of the right of property has risen to the position of a fundamental right. The provision in section 3 of the said Law that ‘there shall be no infringement of a person’s property’ also carries weight when we come to interpret existing provisions of law” (CA 6821/93).

However, on the other hand, former Deputy President Rubenstein also articulated a further concern regarding the fear of the Absentee Property Law's invalidation. While he expressed, “there can be no question that the language of the Absentees’ Property Law... is not consistent with the right of property in section 3 of Basic Law: Human Dignity and Liberty,” he also maintained, “the ‘right to return’ argument... cannot be resolved by judicial interpretation” (Opinion of Deputy President E. Rubinstein, HCJ 5931/06, para. E). Deputy President Rubinstein worried that the judicial invalidation of aspects of the Absentee Property Law could be seen as legitimizing the Palestinian right of return and that the annulment of the Law on principled

grounds could thus result in national suicide-- a political decision Deputy President Rubinstein finds well beyond the scope of the Court.

Indeed, the Palestinian right of return is the political position or principle holding that Palestinians who left their homes in Israel's pre-1967 borders during the War of Independence have the right to return to their land. This position is legally backed by UN Security Council Resolution 194 (1948), which states,

[t]he refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of those choosing not to return and for loss of or damage to property which, under principles of international law or in equity, should be made good by the governments or authorities responsible.

Further, UN Security Resolution 3236 (1974) reaffirms "the inalienable right of the Palestinians to return to their homes and property from which they have been displaced and uprooted, and calls for their return." Nevertheless, legitimizing the Palestinian right of return could result in the the destruction of Israel's Jewish identity and purpose. Israel's acknowledgement of this return via any kind of principled annulment of the effects of the Absentee Property Law under Basic Law: Human Dignity and Liberty could be interpreted by Palestinians as well as the rest of the international community as practically legalizing the movement of approximately 6 million Arabs to Israel's territory within the Green Line (LeVine). If every Palestinian refugee who lost her property under the Absentee Property Law during the War of Independence and her descendants returned to Israel, this group of people would consist of more than 40% of Israel's population, placing extreme tension on not only government structures (especially since the Knesset reflects pure proportional representation) but also Israel's national identity as a Jewish state ("Fact Sheets: The Palestinian 'Right of Return'"). Legitimizing the Palestinian right of return has the potential to destroy the Jewish nation's right to self-determination and the propagation and protection of the Jewish people for generations to come, and for this reason, former Deputy President

Rubinstein argued that the solution to this complicated political matter lies beyond the scope of the judiciary's powers.

However, in making this argument, former Deputy President Rubinstein allows us to explore the correct application of the broader reading of the Validity of Laws clause, for former Deputy President Rubinstein failed to recognize the most fundamental aspects of this interpretation. The broader, more-principled reading seeks *not* to invalidate all laws passed before 1992 that do not fit within the explicit bounds of the Basic Law but to balance Israeli constitutional principles so as to create a more holistic approach to justice that is not time sensitive but unique to Israel's identity as a Jewish state seeking to uphold democratic principles and rights to furthest feasibility. Interpreting the Validity of Laws clause within the scope of the principles implicit within the Basic Laws does not compromise Israel's Jewish identity in the name of producing a more just and fully democratic society but exactly the opposite. It seeks to uphold Israel's unique self-proclaimed dual identity within the scope of its constitutional law and maintain that all laws, regardless of the time of their enactment, must uphold Israel's democratic promises to the greatest extent possible. This approach therefore also implicitly recognizes that the Basic Laws provide protections against the invalidation of laws if these laws are imperative to the very preservation of the state and its unique national identity. All laws determined necessary for the protection of Israel's fundamental national identity and self-preservation are justified under the Basic Law to the extent required for the fulfilment of the law's purposes, regardless of the date of their enactment.

Thus, this paper holds that former Deputy President Rubinstein's concerns about the invalidation of the Absentee Property Law's application within the Green Line are already addressed. If one correctly articulates a broad reading of the Validity of Laws clause within the scope of the Basic Laws, one will see that the Absentee Property Law must remain valid for the

preservation of the state and the continuation of the state's national identity against the Palestinian right of return (an argument to which we will turn shortly in the following section). Upholding the validity of the Absentee Property Law on these grounds allows Israel to uphold its democratic principles within the entire legal framework and maintain the consistency of Israeli jurisprudence. The same test of necessity under the limitations clauses will be imposed for all violations of Basic Law: Human Dignity and Liberty, and thus, Israeli law will speak with one voice with regards to its democratic identity.

By interpreting the Validity of Laws clause broadly, we have established a framework whereby only the breaches of individual rights that are absolutely necessary for the survival of the state and its founding ideological values are allowed under the Israeli constitutional scheme. This is what it means for Israel to uphold its democratic identity within all aspects of the law-- a fundamental requirement of a democratic legal scheme that upholds coherent and consistent democratic principles. It is within this framework that we now seek to explore the validity of the Absentee Property Law in both its application to Israel's territory within the Green Line and its application to East Jerusalem. We will thus explore when instances of democratic failure are necessary for the very existence and preservation of the state and therefore justified under the limitations clauses set forth in Basic Law: Human Dignity and Liberty.

### **Differentiating Cases: The Absentee Property Law's Initial Application vs. Its Use in East Jerusalem**

In this section, we will finally turn to our discussion of the Absentee Property Law and the distinction between its initial enactment under Emergency Regulations law during the War of Independence as well as its ratification into Israeli law in 1950 and its use in East Jerusalem following the Six-Day War. I will argue that if Israel is to maintain its democratic principles and

identity as fortified in the Basic Law, it must only breach individual property rights under the utmost necessity when the state's very existence as a Jewish state and the founding purposes of the Jewish nation are significantly challenged. Property expropriations under the Absentee Property Law must not be taken lightly by the state. Rather, they must be seen as democratic failures justified only by absolute necessity in order to maintain the survival of the state in the most extraordinary circumstances under the limitations clauses.

Recall that the day after the United Nations General Assembly voted to partition Mandate Palestine into a Jewish and a Palestinian state, many Arabs who had lived within Mandate Palestine initiated violent clashes that ignited the War of Independence by attacking the state's new commercial center and burning and looting Jewish shops. These Arab militias were hostile to the very idea of the State of Israel and its existence in the region and therefore initiated acts of violence in order to display their belief that the entire territory of former Mandate Palestine was theirs and eliminate Jewish presence in the region (Shapira 157). From the viewpoint of the Arabs who had taken up arms, Israel did not have a right to exist. Their position therefore posed drastic threat to the possibility of Israel's establishment as a Jewish state and its ability to ensure the perpetuation of the Jewish nation. For this reason, Zionist leadership enacted the Absentee Property Law under Emergency Ordinances during wartime and modeled it on the British Trading with the Enemy Act for the purpose of securing abandoned enemy assets. While the Israeli leadership's actions effectively undermined property rights for former Arab residents of Mandate Palestine, including those who vacated their property but remained within the territory of the state upon its establishment and were subsequently granted Israeli citizenship, these actions were nonetheless essential to the immediate extranormal war times that posed a direct threat to the possibility of Israel's existence. Haganah officers could not take the time to explore each individual case and investigate the reasons why these absentees had evacuated their homes.

Rather the extreme wartime circumstances necessitated immediate and broad scope action that secured this property.

But what of Israel's enactment of the Absentee Property Law into statutory law? Remember that at the conclusion of the War of 1948, Israel did not return the property that fell within the Green Line to individuals it considered absentees but rather ratified the Absentee Property Law into the new Israeli legal system in 1950 and subsequently used this absentee property for its own development purposes. We must therefore scrutinize the Absentee Property Law of 1950 in light of its fit with Basic Law: Human Dignity and Liberty. This paper will hold that the state's continued claim to this expropriated land within the Green Line under the Law was required due to the massive immigration of Jews who flooded the fledgling state from 1948-1951 and that the state's actions under the Law were therefore justified as essential for the preservation of the state's Jewish identity.

Militarily, the situation in the Middle East remained one of hostility after the War of Independence. However, this rationale does not explain the entire picture. Regardless of the absentees' perhaps hostile sentiments towards the establishment of the state, their absence provided Israel with an opportunity. It must be noted that many Israeli leaders looked at the situation in 1949 and recognized that the absence of hundreds of thousands of Arabs presented Israel with a tremendous benefit for their aspirations to create a majority Jewish state. As Shapira describes in her account of Israel's history, "[t]he discussions and preparations for the establishment of the state had assumed that it would include a large Arab population. Now, [given the Arab evacuation]... a new reality materialized... The conclusion was that the State of Israel could not allow the Arabs to return to their homes" (Shapira 174).

While from April-June 1984 there was no military or political decision that resulted in the mass Arab flight during the War of Independence, "it was understood by all concerned that,



militarily, in the struggle to survive, the fewer Arabs remaining behind and along the front lines, the better and, politically, the fewer Arabs remaining in the Jewish state, the better” (Morris 47). The flight of Palestinians from what became Israel presented the new state with a tremendous benefit in its efforts to build a new national identity, and state leadership sought to preserve this result. Moshe Sharett, the second Prime Minister of Israel, summarized this position when at a meeting of the provisional government on June 16, 1948:

Had any of us said that one day we must get up and expel [the Arabs]-- it would have been considered madness. But if it came about during the upheavals of war, a war declared on us by the Arab nation, and as the Arabs themselves were fleeing-- then it is one of those revolutionary changes after which history does not return to the status quo ante. (qtd. in Shapira 174-175)

At the conclusion of the war, Zionist leadership preserved this result in order to assist the new nation’s statebuilding efforts. While the state legally incorporated the 30,000-40,000 Palestinians who remained within the state of Israel at the time of its establishment and offered them citizenship, Ben-Gurion and other instrumental foundational leaders sought to create a ideologically Jewish state (Bokae’e 4). They capitalized upon the Arab flight during the war, understanding the already difficult situation of having to forage a nation still under threat by its neighbors. Amidst the chaotic foundational process of resolving wartime disorder and establishing a new state and rule of law, they could not allow for the return of large numbers of a nationalist people against whom the state had just fought a war. Arab flight and abandonment of property was too great a benefit for the new state to simply return upon the completion of a war in which 1% of the Jewish population at the time died fighting.

Further, Zionist ideology held that all Jews should not only be welcome in the land of Israel but also immigrate to the land in order to unite the Jewish nation and protect the Jewish people from anti-semitism. With this intention, Zionist leadership sought to make Israel a Jewish homeland “open for Jewish immigration and for the ingathering of Exiles,” a promise that became

legally binding as a subsequent result of the Law of Return (*Proclamation of the State of Israel*). The *Proclamation of the State of Israel* further states, “[o]ur call goes out to the Jewish people all over the world to rally to our side in the task of immigration and development and to stand by us in the great struggle for the fulfilment of the dream of generations--the redemption of Israel” (*Proclamation of the State of Israel*). This declaratory promise was nevertheless challenged in Israel’s first three years by the sudden and massive immigration of 687,000 European and Mizrahi Jews to the land: “despite the intense expectation and the rhetorical anticipations of the arrival of this aliya, no one was actually prepared for the tremendous mass of humanity pouring into the country” (Shapira 222). Indeed, Israel’s population doubled in its first three years due to the massive immigration of Holocaust survivors and Mizrahi Jews escaping increased anti-semitic actions in the countries of their origin. This drastic population change would unsettle even the most established of states. Yet, Israel nonetheless faced this challenge immediately after winning the War of Independence and at the very same time that Israel was struggling to create the foundations of a state.

Israel’s first years were already marked by several severe shortages due to its military expenditures during the War of Independence, and the rate of immigration imposed even more extreme hardships upon the state. The state’s stocks of food and fuel in the years between 1949 and 1952 were close to zero and thus relied on fuel tankers and grain ships purchased on short term credit just to provide its growing population with essential services. However, understanding its foundational role as a Jewish state that both protects its citizens from anti-semitism and serves as a homeland for all Jewish people, Israel willingly and immediately absorbed this massive amount of immigrants. Israeli leadership undisputedly held that the state had an ideological duty to provide homes for the hundreds of thousands of Holocaust survivors and North African and Eastern Jews who were taken to Israel in order to protect them against increased anti-semitism.

But these absorption practices nonetheless placed extreme strain on Israel's very new government to provide these new citizens with various social services and a places to live (Shapira 209-212).

A memoir written by Giora Josephtal in August of 1951, during the time in which he worked in the Jewish Agency's Absorption Department, sheds light on both the state's ideological feeling of duty to absorb these Jewish immigrants in order to uphold the state's central purpose in these immigrants' time of need and the extreme strain their absorption placed on the entirety of Israeli society:

During the three years since Israel's establishment, the bodies responsible for absorbing the immigrants have waged a constant battle with material, organizational, and spiritual problems in order to enable the mass immigration to continue. Even if the local Jewish community is showing certain signs of fatigue under the strain of taking in so many immigrants in such a short time, we are duty-bound to do everything possible before the gates of potential sources of immigration are closed, and not wait for pogroms in countries where the Jewish community's political situation is today clearly unstable... The most immediate task is to rescue the Jews living in Arab lands [from anti-semitism]. The Jewish people left us in a state of poverty at the decisive moment when Israel had to be saved. We are continuing to take in the waves of mass immigration and to conduct a desperate campaign against a shortage of raw materials and means of production, a shortage of funds, and a shortage of trained personnel. What does every new arrival need the moment he reaches Israel? A roof over his head..." (Josephtal 104).

Josephtal thus speaks of the extreme conditions forced upon the state in the first three years of sovereignty. In response to the imminent land needs of the state in order to uphold its primary purpose as a Jewish nation, Israel required a rapid legal answer that would allow the state to use the abandoned formerly Palestinian property that had come under Israeli territory as a result of the war (Shapira 222-223). The ratification of the Absentee Property Law into statutory law thus served the functional means by which Israel was allowed to fulfill its promises and identity as a Jewish state which would remain open to the immigration of all Jewish people to provide these immigrants with a home, citizenship, and protection as well as mitigate some of the strain the great Aliyah placed on the state's structure and development. These actions ultimately allowed

Israel the ability to build a state with a Jewish national identity, thereby fulfilling its declaratory promises and intentions.

When Israel ratified the Absentee Property Law into Israeli law in 1950, the state made the decision to hold onto the property it had acquired under the Law's emergency regulations version and continue the state's expropriatory actions rather than return this property to its former Arab owners. These actions did not and certainly do not align with Israel's present democratic identity as articulated within the Basic Laws. Nonetheless, the land attained under these measures was justified based upon the state's imminent need for the immediate settlement of hundreds of thousands of Holocaust survivors and escaping Mizrahi Jews. Due to the massive influx of Jewish immigrants during the state's first three years, the state relied upon the Law to fulfill its declaratory promise to provide a place for all Jews who wish to return to the Land of Israel. The state's initial actions under the Law therefore allowed for the state to uphold its Jewish identity and fundamental principles in a time of extreme necessity.

However, while these actions arguably fit clause 12 of Basic Law: Human Dignity and Liberty in terms of serving a vital purpose for the foundational values of the Jewish state, the Absentee Property Law continues to provide the legal means for Israel's holding of expropriated land. Ever since 1950, Israeli courts have continued to recognize the Law as providing the justification for Israel's use of the absentee land within the Green Line territory since the establishment of the state. In *Golan v. Special Committee* (1994), the High Court of Justice held that the state has

the ability to utilize [absentee property] to promote the country's development, while preventing its exploitation by anyone who is an absentee within the meaning of the Law, and [has] the ability to hold it (or its proceeds) until the formulation of political arrangements between Israel and its neighbors, in which the fate of the property will be decided on the basis of reciprocity between countries. (HCJ 4713/93)

This ruling has since been recognized as the leading precedent on this matter. While Israel's rate of immigration was greatly reduced after the state's first ten years, the courts have continued to recognize Israel's ability to use absentee land for its own growth and improvement within the Green Line.

So why should these actions be justified, if they are seemingly in direct violation with clause 12 of Basic Law: Human Dignity and Liberty which states, "emergency regulations may be enacted by virtue of [clause 9 of the Law] to deny or restrict rights under this Basic law, provided the denial or restriction shall be for a proper purpose and for a period and extent no greater than is required"? How can Israel defend prolonged absenteeism? Here, we must consider a couple of factors. First, returning this land would displace hundreds of thousands, if not millions, of Israeli citizens who have been living on this land and using it since 1948--thereby creating a new kind of injustice where Israeli citizens who are decades removed from the initial expropriatory action could be forced to pay the costs of these reparations. This scheme of justice appears just as compromised, if not more, than the one we are trying to examine and does not fit with the scheme of justice implicit within the Basic Laws that seeks to weigh Israel's dual identities as both a Jewish and democratic state.

Secondly, while this administrative concern is significant, it pales in comparison to the ideological and state-preservational concern raised by the former Israeli Supreme Court Deputy President, Justice Rubinstein, regarding the Palestinian right of return. The state could hypothetically provide some mechanism or program for replacement, returning the 3,250 square kilometers of Palestinian agricultural lands, deserted homes, and buildings left behind during the War of Independence. Nevertheless, if the returning of this land would be antithetical to both Israel's nationhood and continued development as well as its foundational Zionist ideology, then it draws the foundational purpose and identity of Israel as a Jewish state into question. As noted in a

previous section, the movement of approximately 6 million Arabs to Israel's territory within the Green Line would result in this group consisting of more than 40% of Israel's population, undermining Israel's Jewish identity as a majority Jewish state that serves to protect the national interests of the Jewish people. Israel must therefore preserve the validity of the Absentee Property Law and uphold its application within the Green Line in order to safeguard the state's fundamental purposes-- the right to self-determination and the propagation and protection of the Jewish people for generations to come.

Because the central aspirations of the state could foreseeably be brought into question by legalizing the movement of approximately 6 million Arabs to Israel's territory within the Green Line, the State of Israel must therefore continue to deny Palestinians the rights to return to the land that they had left behind in the 1948 War in order to preserve its national Jewish identity-- the very identity for which it was founded. The validity of the Absentee Property Law's application to Israel's pre-1967 territory must therefore remain valid in order to preserve the very founding intentions of the state and the essential self-preservation of its Jewish identity. The application of the Absentee Property Law as it was originally intended to apply is therefore legitimately justified despite its mass expropriative application under the principles enshrined in Israel's constitutional scheme.<sup>5</sup>

However, as we will see, these standards of necessity are not met regarding the Absentee Property Law's application to East Jerusalem. While the State of Israel can defend its expropriatory actions under the Law on the grounds of the immanent needs of the fledgling state

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<sup>5</sup> Additionally, under the Compensation for Lost Property Law (1973), it is legally possible for Arab permanent residents of Israel (including those residing in East Jerusalem) and Arab Israeli citizens to receive compensation for the property they or their ancestors lost during the War of Independence. The actualization of the right to compensation by residents of East Jerusalem remains extremely limited due to the fact that these individuals were often deterred from receiving compensation for political reasons. Many did not apply for compensation due to the fact that they did not want to grant the perception that receiving compensation legitimizes Israel's practices or authority in East Jerusalem (Ben-Hillel 32). Nonetheless, this law acknowledges Israel's undemocratic expropriation of land under the Absentee Property Law and seeks to provide qualifying Arabs with monetary compensation for their losses.

and of Jewish immigrants as well as Israel's preservation of its Jewish identity and foundational purpose, this argument cannot be used with respect to the Absentee Property Law's application in East Jerusalem.

The State of Israel initially refrained from applying the Absentee Property Law to East Jerusalem because it recognized the multiple complications that would ensue as a result and the dissimilarity between this application from its initial use within Israel's Green Line territory. Specific differences exist between the residents of the West Bank and those of the enemy areas against which the emergency regulations version of the Absentee Property Law was intended to defend. Unlike the "enemy states" against which the 1948 Absentee Property Law originally defended, Israel does have a certain amount of control over the West Bank in the form of a military government. Moreover, the land that fell under the definition of absentee property in East Jerusalem following the Six-Day War cannot not be considered essential under the Basic Law's test for the restriction of rights. This land is not imperative for Israel's continued existence as a Jewish state. Those who became absentees because of the state's expansion of its administration and law to East Jerusalem were given absentee status largely overnight. They became absentees not because of any actions performed by these individuals, but because of Israel's actions following the Six-Day War and the fact that these individuals happened to be absent from East Jerusalem at the relevant time of the census. Israel did not apply this Law to the region out of need but rather passively allowed it to apply along with the rest of Israeli law. Additionally, as evidenced by the state's efforts to explicitly exempt all present East Jerusalem Arabs from absentee status on the date of the census, if the property owners had instead been present on the date of the census, the land in question would not be classified as absentee property. The state therefore cannot justifiably argue that the expropriation of this land fundamentally allows the state to continue to exist and perpetuate the continuation of the Jewish people, for it is only the

procedural application of this law that allows the state to arbitrarily confiscate property based upon the owner's absence on a specific date.

Further, as noted in the Ayad family case, it is extremely possible for individuals to reside on absentee property and even hold what they believe to be ownership rights to this land without even being aware of the property's legal status as absentee property. Because the Absentee Property Law does not require the Custodian to give any notice of the property's absentee status before taking it, the courts have upheld that the state may take this property at any given time--perhaps decades after the property's initial classification as absentee property (HCJ 5931/06, para. 28-29). These actions specifically undermine the very institution of property rights in Israel and collide with the principles espoused in the Basic Laws. Selective takings of East Jerusalem property years after the initial application of the Absentee Property Law to the region conflict with Israel's identity as a democratic state for no compelling reasons.

Additionally, Israel cannot argue for this land based upon the grounds of imminent necessity. Not only is this argument problematic because it allows the state to overextend and exploit the strict constraints of necessity and imminent need so as to fit the state's convenient desires, the historical circumstances of 1967 did not justify an expanded application of the Law. Unlike Israel's state of affairs in 1948-1951, the military conquest of the Six-Day War that resulted in Israel's acquisition of East Jerusalem was the state's most expedient display of military dominance to date. Further, immigration statistics in 1966 and 1967 numbered approximately 16,000 and 14,500 respectively and reflect some of the state's lowest immigration years to date (Zieve).

Thus, at the time of the Absentee Property Law's application to East Jerusalem, then Attorney General Meir Shamgar advised that he and his office:

...found no relevant justification to seize property that became absentee property at the same time that the owner of the property--a resident of Judea and Samaria--



came under the rule of the Israeli government authorities. In other words, since the property was not an absentee property a day before the IDF forces entered East Jerusalem, and would not have become an absentee property had East Jerusalem continued to be part of Judea and Samaria, [Shamgar and his office] saw no justification for the annexation of East Jerusalem, and that alone, to lead to the seizing of the property of a person who is not in fact absent, but has been absent from the same time that his property came into our possession under the rule of IDF forces. (The letter from Meir Shamgar to the Israel Land Administration, August 1969 as qtd. in “Absentees against their Will” 2)

Israel markedly followed this advice during the first decade of its control in East Jerusalem and refrained from expropriating land in the region under the Absentee Property Law. Instead, Israel’s land expropriations in East Jerusalem at this time were justified under public needs requirements or security concerns (“Absentees against Their Will” 2).

However, in the years leading up to the 1980s, this policy began to change along with the rising presence and political support for the Likud party and other rightist parties in the Knesset. As early as 1977, residents of the West Bank who held property in East Jerusalem were required to register their property with the Land Registry in order to continue to possess and use their property. Yet this registration allowed the State of Israel to conduct extensive searches regarding the property’s history in order to determine whether the property was absentee property and therefore subject to expropriation. The Custodian gained control over multiple properties in East Jerusalem as a result of this process, and in a few cases, the absentee property was eventually subleased to rightist development authorities such as the Israel Land Fund which continue to openly seek to transform the physical and demographic landscape of Jerusalem into a majority Jewish region (“Absentees against Their Will” 2). The Israel Land Fund openly champions, “*all* the land of Israel belongs, not just to a Jewish organization or to a government body, but to each and every Jew” on its website (emphasis added), and its primary mission statement reads: “reclaiming the land of Israel for the people of Israel,” under which “the land of Israel” is understood to mean the territory of Israel’s control immediately following the Six-Day War.

In 1992, the State of Israel enacted the Klugman Committee, headed by the then-director general of the Ministry of Justice, Haim Klugman, in order to examine buildings and settlement practices in East Jerusalem. This committee was formed in response to continued international criticism regarding Israeli settlement practices in East Jerusalem and actively criticized the practice and use of declaring property absentee property in Jerusalem. At the conclusion of the Committee's findings, Attorney General Yosef Harish ordered the termination of the use of the Absentee Property Law in East Jerusalem, especially in instances where the property was subsequently transferred to right-wing settlement groups. The Prime Minister at the time, Yitzhak Rabin, adopted the committee's opinion and also spoke out against the government's efforts to apply this law in East Jerusalem ("Absentees against Their Will" 3).

However, in 1997, the limitations that the Klugman Committee had instituted were eased, likely as a result of Benjamin Netanyahu becoming Prime Minister and the Likud party returning to lead the majority coalition in the Knesset. Under their national security platform, the Custodian was once again permitted to issue certificates giving this land to the Development Authority in respect to vacant properties ("Likud"). In 2004, it became evident that Israel intended to make full systematic use of the Absentee Property Law in East Jerusalem as "the Ministerial Committee on Jerusalem Affairs made a decision declaring that it sought to remove all the limitations on the exercise of the Custodian's power in respect of properties in East Jerusalem" (HCJ 5931/06, para. 30). These actions may have resulted from the outbreak of the Second Intifada which destroyed both hopes of peace and Israel's trust in the Palestinians. As serious riots raged throughout Israel's side of the Green Line and scores of both Arabs and Israelis were wounded, Jewish-Arab relations in Israel were shattered. The Jewish Israeli public began to severely question the government's ability to protect its citizens and ensure their safety, and these sentiments in turn spurred the Israeli government headed by Likud to enforce further proactivist safety mechanisms against

Palestinians (Shapira 447). The increased use of the Absentee Property Law in East Jerusalem after 2004 is therefore likely tied to the state's efforts to further secure the region through the unification and total control of the whole Land of Israel ("Likud").

According to the 'Peace and Security' section of Likud's own platform, the settlements in Judea, Samaria, and Gaza were created and are supported by the Likud party for the further realization of Zionist values. The settlement of this land is an expression of the right of the Jewish people to live in the Land of Israel and constitutes a vital component in the defense of the state ("Likud"). However, property expropriations under the Absentee Property Law are unnecessary for even Likud's intended purposes. Halting the use of the Absentee Property Law in East Jerusalem will not restrict the government from taking land for public needs or for military and security purposes that meet the standards set by the limitations clauses of the Basic Laws. Further, these other mechanisms are likely to be more suitable for Likud's needs, for land usurpations under other more explicit laws, such as the Emergency Land Law and the Acquisition for Public Purposes Ordinance, more explicitly fit with Likud's stated intentions.<sup>6</sup>

In response to the Ministerial Committee's determination to apply the Absentee Property Law to further cases in East Jerusalem, then-Attorney General M. Mazuz urged the committee to reinstate the previous policy. Mazuz pressed the state not to apply the Absentee Property Law in East Jerusalem, except in the most exceptional of circumstances. In 2005, Mazuz wrote a letter to Benjamin Netanyahu, who was the Minister of Finance at the time and the person responsible for the implementation of the Law. He wrote,

The absenteeism of property in East Jerusalem of residents of Judea and Samaria is of a technical character since they became absentees because of a unilateral act

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<sup>6</sup> While my present purpose is to explain why Israel should specifically refrain from applying the Absentee Property Law to the region, I nevertheless also hold that any other violations of the rights under the Basic Law should be held to the same test under the limitations clauses so as to ensure that Israeli jurisprudence remains consistent in its articulation of its democratic identity. The burden of proof is therefore whether the law enacted under clause 9 of Basic Law: Human Dignity and Liberty meets the "proper purpose" and "for a period and extent no greater than is required" standards of clause 12.

taken by the State of Israel for a different purpose, when both the properties and their owners were under the control of the State of Israel, and where it would appear that the purposes of the Law are not being fulfilled here. Involved are, in fact, ‘attendant absentees’, whose rights in their property have been denied due to the broad technical wording of the Law. Moreover, as regards residents of Judea and Samaria whose property in East Jerusalem has become absentees’ property, the result is particularly harsh because applying the Law means the denial of the property without any compensation, because the Absentees’ Property (Compensation) Law 5733-1973 grants compensation only to absentees who were residents of the State of Israel (qtd. in HCJ 5931/06, para. 28).

Nonetheless, Mazuz’s concerns about the application of the Absentee Property Law to East Jerusalem were mostly ignored. In recent years, the State of Israel has conducted an increasing number of critical property examinations in order to determine whether the Palestinian residents who own the property in question are included in the absentee category. This signifies that the past few and current administrations seek to increase the Jewish presence in East Jerusalem and reclaim important pieces of land in the Old Yishuv through the enforcement of the Absentee Property Law in East Jerusalem (“Absentees against Their Will” 4). These actions cannot be considered justified violations of individual property rights within Israeli democracy. They serve neither imminent need nor the preservation of the Israeli state.

Thus, this paper holds that the Israeli government’s increasing application of the Absentee Property Law to East Jerusalem should be halted. Despite recommendations from Israel’s past secretary generals stating otherwise, the state has increasingly made use of the Absentee Property Law in East Jerusalem, likely with the goal of increasing Jewish control in the region. However, in doing so, Israel has expropriated property and undermined its democratic identity for no vital purposes imperative to Israel’s survival as a Jewish state. In order to uphold Israel’s constitutional framework and promises, the state must return to the policy proposed by Attorney General Shamgar and refrain from acting on the application of this Law to East Jerusalem. The procedural check proposed by the Court in *Hussein v. Cohen* is not enough. Rather, in light of a holistic,

principled based reading of the Basic Laws, the Absentee Property Law should not be applied to East Jerusalem without a demonstrated showing of national necessity.

## **Concluding Remarks**

In this paper, I have used Israel's developing constitutional scheme to evaluate the extent of the Absentee Property Law's legitimacy within Israeli law, given its expropriatory purpose and effects. Since 1992, Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation has made explicit Israel's democratic commitment to the protection of specific rights, including property rights, into Israel's constitutional framework so as to uphold the state's protection of human dignity. Not only is this protection important to the legal preservation of Israel's democracy and its ability to uphold its declaratory promises, the state has also recognized the supremacy of the Basic Laws above ordinary statutes, giving them constitutional status and granting the judiciary the power of judicial review. This paper held that the Validity of Laws clause must be interpreted broadly in order to fully implement and balance the state's Jewish and democratic identities in every aspect of the law and not just prospectively. In order for Israel to uphold its constitutional promises, the state must act democratically and defend human dignity and individual rights to the fullest extent possible.

However, this paper also recognized the need of the Israeli state to compromise its own democratic principles in instances essential to the protection of the existence and perpetuation of the Jewish state. Because Israel's founding intention was to secure the national identity of the Jewish people and shield the state's citizens from the horrors of anti-semitism, Israel's paramount principle must be the preservation of the state's existence as a Jewish nation. In periods which threaten the state's foundational principles, Israel must primarily be a Jewish nation above a

democratic one. Israel must occasionally engage in actions constituting democratic failure when the state's very existence is jeopardized. The state may accordingly violate the rights expressed in Basic Law: Human Dignity and Liberty in extranormal circumstances, but only to the minimal extent required.

Thus, when situations of democratic failure arise, they must be scrutinized within the entirety of the Israeli constitutional framework and especially under the principles enshrined in Basic Law: Human Dignity and Liberty. The Law's limitations clauses recognize that Israel cannot and must not aspire to create a perfectly just society in regards to every circumstance of life and government. Rather, Israel's foundational nature as a Jewish state limits the expression of the state's democratic actions in extreme circumstances when Israel's very survival is brought into question, so long as the actions are "for a proper purpose" and "for a period and extent no greater than is required" (clause 12, Basic Law: Human Dignity and Liberty).

Regarding the Absentee Property Law, we have explored the validity of this Law's application to both Israel's territory within the Green Line and its more recent use in East Jerusalem. We found that the initial application of the Absentee Property Law was necessary for the very existence of the Jewish state due to its use during the War of Independence and within the first few years of the state's foundations. In response to its imminent need, the Absentee Property Law allowed for the creation of a rapid legal answer that permitted the state to use the abandoned formerly Palestinian property to house new Jewish immigrants escaping anti-semitism in Europe and in surrounding Middle Eastern countries.

Nonetheless, we also found that the use of the Absentee Property Law in East Jerusalem does not meet the conditions of the limitation clauses. While more rightist political groups such as Likud or some of the smaller religious parties in the Knesset may advocate for increased settlement in East Jerusalem, these measures are unnecessary for the survival of the Jewish state.

Even if Israel correctly claims administrative and jurisdictional control over East Jerusalem, property expropriations under the Absentee Property Law in the region are neither necessary for the maintenance of the state's Jewish identity nor for the perpetuation of security and are therefore abridgments of property rights for no imperative reason. Israel's actions in East Jerusalem therefore infringe on fundamental civil rights protected by Basic Law: Human Dignity and Liberty, and thus the state's use of the Absentee Property Law in the region must be halted and rendered invalid.

I lastly seek to comment on the complicated nature of using vague terms such as 'necessity' to legitimate extreme violations of human rights. This paper has by no means viewed these infringements lightly and recognizes the immense importance of upholding rights implicit to personhood and human dignity to the greatest extent possible for all people. Further, this paper also recognizes that 'necessity' can be inappropriately used as a disguise in the justification for unrestrained state actions that are merely desirable. For this reason we turned to Israel's founding declaratory principles and purpose to determine the constitutional scope of the Basic Laws and their limitations clauses. Any state actions that violate rights protected by the Basic Law with intentions short of preserving the state's sovereignty and preservation of the Jewish nation in periods of extreme threat do not qualify as necessary under the limitations clauses. These state actions are instead illegitimate, unconstitutional abridgements of rights, and Israeli courts must not allow this conclusion to be masked under a cloak of necessity.

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